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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 1 73 584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York N. Y. 10016,

JOHN POWERS CROWLEY,
CROWLEY, NASH AND SHEA,
53 W. Jackson Boulevard,
Chicago, Ill. 60604,
Attorneys for Petitioner.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioner, Alan David Sians, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its final order and judgment of July 5, 1973, which affirmed the judgment of conviction of the United States District Court for the Northern District of Illinois, W. D. (Julius J. Hoffman, J.). Under that judgment of conviction petitioner was sentenced to five years in jail and fined $5,000 on a one-count indictment charging violation of 18 USC 1462 (Obscenity).

Opinions Below.

Trial was had in the United States District Court, Northern District of Illinois, W. D. (Hon. Julius J. Hoffman), and was by jury. There was no opinion of the district court. On December 14, 1972, the Seventh Circuit entered a memorandum order directing that its de-

cision on appeal await the outcome of *United States v. Orito,* U. S. , 37 L. Ed. 2d 513 (1973). On July 5, 1973, the Seventh Circuit entered a one-paragraph memorandum order affirming the judgment of conviction. The memorandum orders of December 14, 1972, and July 5, 1973, are not reported; copies are annexed hereto as Appendix A and B.

Jurisdiction.

The memorandum order of the Seventh Circuit affirming the judgment of conviction was entered July 5, 1973. A timely petition for rehearing was filed. On August 2, 1973, the Seventh Circuit granted leave to file an amendment to the petition for rehearing (Appendix C). The petition for rehearing was denied on August 8, 1973 (Appendix D). On August 20, 1973, Mr. Justice Rehnquist signed an order extending the time for filing this petition for writ of certiorari to and including October 7, 1973. This court's jurisdiction is invoked under 28 USC 1254(1).

Questions Presented for Review.

1. On July 5, 1973, the Seventh Circuit summarily affirmed by a one-paragraph memorandum order a judgment of conviction for violation of 18 USC 1462. Should that judgment be vacated and remanded under the First Amendment and Due Process Clause where the Seventh Circuit by its December 14, 1972 order held its decision to await this court's decision in *United States v. Orito,* U. S. , 37 L. Ed. 2d 513, but where the Seventh Circuit memorandum order of July 5, 1973, did not consider any of the multiple questions posed by *Miller v. California,* U. S. , 37 L. Ed. 2d 419, *et al.,* and is in direct conflict with the June 21 and June 25, 1973, dispositions of this court?

2. Under the First Amendment and Due Process Clause can the indictment and conviction under 18 USC 1462 for an act committed before June 21, 1973, in a case pending on June 21, 1973:

A. Be sustained where there was and is no decision in the Seventh Circuit and none under Illinois state law which has authoritatively construed 18 USC 1462 to define patently offensive depictions of hard-core sexual conduct in accord with the definitions in *Miller v. California, et al.*?

B. Can it be sustained under the old utterly without redeeming social value test or new serious literary, artistic, political or scientific value test?

3. A. Was it a violation of the First Amendment and Due Process Clause to deprive defendant of the right to introduce any evidence of community standards?

B. Must the conviction be reversed where it is not clear whether the trial court applied a national standard, a state standard or a local standard?

4. *Miller, supra,* held in state prosecutions that the First Amendment does not require uniform national standards for two substantive elements of the crime, patent offensiveness and prurient interest, that national standards are not ascertainable and states must make their own choices.

A. If national standards are unascertainable, and state law choices must control, then is 18 USC 1462 unconstitutional as furnishing no ascertainable standard of guilt? Has this court made substantive elements of a federal penal statute turn on state law?

B. Under the United States Constitution, Article I, Section 1, and Section 8, Clause 18, and due process, may this court make state law control? If so, is 18 USC 1462 vague and overbroad as to prosecutions pending on June 21, 1973?

5. Under the United States Constitution, Article I, Section 1, and Section 8, Clause 18, and due process, does this court have the power in the first instance to select which of the categories of patently offensive depictions of sexual conduct should be banned?

Constitutional Provisions and Statutes Involved.

Involved herein are the First Amendment and Due Process Clause of the Fifth Amendment to the United States Constitution, Article I, Section 1, and Article I, Section 8, Clause 18, of the United States Constitution; Title 18 of the United States Code, Section 1462 (Appendix E).

Statement of the Case.

A. Preliminary statement.

Before proceeding we emphasize preliminarily the first reason why the petition should be granted. The July 5, 1973, four-sentence memorandum order of the Seventh Circuit is in direct conflict with the disposition in approximately 59 cases decided by this court on June 21 and June 25, 1973, when every state and every federal obscenity conviction was vacated and remanded for reconsideration in the light of *Miller, et al.* The Seventh Circuit memorandum order of July 5, 1973, which affirmed the judgment of conviction, does not remotely purport to contain a reconsideration in the light of *Miller, supra, et al.*

B. The trial.

In August, 1970, petitioner (hereafter defendant) was indicted for knowingly causing, in December, 1968, a common carrier to be used for an interstate shipment of 50 magazines and 80 decks of cards in violation of 18 USC §1462.

The trial commenced April 6, 1971. Defendant's counsel issued subpoenas *duces tecum*, to certain newspapers and their reporters, including the "Daily News," the "Chicago Tribune" (Tr. 7) and "Chicago Today." The testimony and material was sought for purposes of demonstrating community standards concerning the types of sex-oriented material openly sold (Tr. 13), and the cross-sections and different types of persons in the community openly purchasing such material "as very revelant to this lawsuit to determine whether or not our standards are such that the material should not be considered obscene" (Tr. 13); the testimony "will be relevant in aiding this court in determining what the standards of this community are in this community" (Tr. 27).

On April 6, 1971, the court quashed the subpoena on the "Daily News" (James Kloss) on the ground that "there is nothing in the subpoena that indicates that there is anything germane to the issues" and that it is "an absurdity" (Tr. 15). On April 7, 1971, the court quashed the other subpoenas stating *inter alia* (Tr. 30) that "these cases are not • • • decided based on standards of a community."

The trial court in over 30 pages of argument (Tr. 7-38) made it very plain that evidence of what was being openly sold and purchased was not going to be admitted for defendant on the issue of community standards. The testimony would have shown that what the Seventh

Circuit calls "shockingly obscene" was being openly sold and purchased by respectable elements of the community. Subsequently, the trial court (Tr. 484-490) refused to permit the defendant to testify as to what he had purchased in book stores in Chicago to "show the standards of the community," and on this issue made a comment in the presence of the jury (Tr. 486) which was tantamount to a directed verdict for the government.

James Harris, the first government witness testified that in November, 1968, he arranged to purchase magazines and playing cards from defendant (Tr. 124-125), and in early December, 1968, received the material at the Greyhound Bus Depot.

Thereafter the trial court permitted the government to elicit testimony (previously excluded) concerning preindictment transactions in September, 1968, and in October, 1968, and post-indictment transactions between Harris and defendant. Over repeated objections, the government's case was replete with testimony by Harris and others about defendant's general business in "pornography" (Tr. 269-270), "good movies" (Tr. 276) and dealings in "similar" types of materials, all involving acts completely unrelated to the indictment. We will assume, *arguendo* only, that the government's position is correct that evidence of other dealings in alleged "pornography" was admissible to show intent or common scheme, and certiorari is not sought merely to review this point.

However, if the government, in an obscenity prosecution, is to be permitted to show acts of a defendant unrelated to the indictment in dealing with sex-oriented and alleged pornographic material, casting it all in the light of supposed illegality, then it is even more important that a defendant be permitted to show what material others are openly selling on the community standards issue.

Otherwise, the case boils down to a directed verdict for the government, which is essentially what happened.

The trial court also excluded all evidence offered by defendant on community standards, including publications with pictures of sexual intercourse, etc., openly sold in the Chicago area and purchased by defendant. The error was compounded by the following. The court, in the presence of the jury, looked at one of the exhibits for purposes of determining admissibility, and stated (Tr. 487):

> "I think that if this demonstrates the standards of the community, maybe it is well that this cause proceed to try to change the standards, Mr. Rotenberg."

The trial court charged the jury as follows (Tr. 637):

> "• • • The material must be judged by the standards of the community as a whole. In determining contemporary community standards, you may consider what, as shown by the evidence admitted during the trial, appears in contemporary magazines, books, newspapers, television programs, motion pictures and other media of communication which are freely available in the community as a whole."

Thus the trial court stated that the jury should consider what was "freely available in the community as a whole," but refused to let the defendant show what was "freely available." Aside from due process error, the questions presented as to how and when a defendant can introduce community standards evidence involves a constantly recurring problem (Pt. III-A, *infra*) with little guidance from this court.

C. The memorandum orders of the Seventh Circuit.

On December 14, 1972, the Seventh Circuit Court of Appeals entered a memorandum order directing that the decision "of this appeal be held in abeyance until the Supreme Court decided the case entitled *United States v. Orito*" (App. A). On July 5, 1973, the Seventh Circuit entered a memorandum order of four sentences stating that *United States v. Orito* answered appellant's challenge to the constitutionality of the statute, and that "the material, by any standard, is shockingly obscene" (App. B).

The unconstitutionality of 18 USC 1462 on *Stanley v. Georgia*, 394 U. S. 557 (1969), grounds was first raised on pretrial motion (denied) and on appeal. The exclusion of proof of community standards (Pt. III-A, *infra*) was raised at the trial, appeal and in the rehearing petition. The remaining issues posed in this petition involving *Miller, supra, et al.*, grounds were raised by the petition for rehearing and amendment to the petition for rehearing.

REASONS FOR GRANTING THE WRIT.

I.

The July 5, 1973 memorandum order is in direct conflict with *Miller v. California, et al.*, and the approximately 59 dispositions of June 21 and June 25, 1973; and does not carry out one of the main objectives of *Miller, supra;* the matter is of nationwide importance. At a minimum the judgment should be vacated and remanded.

The July 5, 1973, memorandum order of the Seventh Circuit affirming defendant's judgment of conviction (and five-year jail sentence) is in direct conflict with the dispositions in the approximately 59 obscenity cases of June 21 and 25, 1973, in conflict with *Orito, supra,* and, more important, with one of the main principal objective of *Miller, supra, et al.*

In every state and federal case involving an obscenity statute the criminal judgment of conviction was vacated and remanded. However, the Seventh Circuit's memorandum order summarily affirmed with no reconsideration.

The Seventh Circuit by its December 14, 1972, memorandum order stated it was holding its "decision of this appeal * * * in abeyance until the Supreme Court decided the case entitled *United States v. Orito* * * *." But in *Orito, supra,* 37 L. Ed. 2d at 519, this court vacated and remanded "for reconsideration of the sufficiency of the indictment in the light of *Miller v. California, supra; United States v. 12 200-Ft. Reels, supra,* and this opinion." The Seventh Circuit's July 5, 1973, memorandum order did not reconsider the indictment sufficiency or conviction in the light of any of the issues.

One of the clear main objectives of *Miller, et al.*, in formulating the new second prong (part b) of the new tripartite test was to give the states and federal government opportunity to specifically define patently offensive depictions of sexual hard-core conduct so as to give fair notice and fair warning. *Miller* certainly made it plain that it was only "today [i. e., June 21, 1973], for the first time since *Roth* • • • a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography" so that the court can now give "positive guidance," 37 L. Ed. 2d at 434, and, 37 L. Ed. 2d at 432, "no one will be subject to prosecution • • • unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

The stated objective of this court in requiring that patently offensive depictions of sexual hard-core conduct be specifically defined to give fair notice and positive guidance is certainly not being furthered by the Seventh Circuit's affirmance which merely says "the material, by any standard, is shockingly obscene." Intending no disrespect to the Seventh Circuit, this is not an authoritative construction and is not a definition under *United States v. 12 200-Ft. Reels,* U. S. , *supra,* 37 L. Ed. 2d at 507, n. 7; it is as meaningless as the widely divergent pre-*Miller* non-definitions of hard-core pornography.

We are not suggesting that the old, discarded, ambiguous, nonascertainable standards of guilt or that part (b) of the new test with standards are yet to be specifically defined can be applied to this case to send a man to jail for five years on a one-count indictment. We submit they can't be (see Point II *et seq.*). However, the Seventh Circuit memorandum order has made no attempt to define

the terms under part (b) of the test for future guidance, or to consider any of the other issues of *Miller, et al., supra.* On a matter as important as this affecting entire industries and hundreds of cases, this court and all concerned are entitled to a reasoned and considered analysis of the views of the lower court. On this basis alone the judgment should be vacated and remanded.

We note that as of the date of writing this petition state and federal courts have, on reconsideration under *Miller,* set aside indictments and obscenity convictions or invalidated obscenity statutes on various of the grounds here urged under Point II, *infra.* Indiana—*Stroud v. Indiana,* 273 N. E. 2d 842 (Ind. Sup. Ct. 1971), vacated and remanded U. S. , 37 L. Ed. 2d 1025 (June 25, 1973), on remand *Stroud v. Indiana,* No. 570 S. 107, Ind. Sup. Ct., Aug. 21, 1973, and *Mohney v. Indiana,* 276 N. E. 2d 517 (Ind. Sup. Ct. 1971), vacated and remanded U. S. , 37 L. Ed. 2d 1026 (June 25, 1973), on remand *Mohney v. Indiana,* No. 471 S. 94, Ind. Sup. Ct., Aug. 21, 1973 (in *Stroud* and *Mohney, supra,* Indiana obscenity statute held unconstitutional; judgments of conviction reversed). California—*United States v. Lang,* No. 10712-HP-CD, C. D. Cal., July 18, 1973 (indictment dismissed). Florida—*Papp v. Florida,* Nos. 70-1077, 71-917, Fla. Dist. Ct. App., 4th Dist., July Tm, 1973 (conviction reversed and indictment dismissed; *Miller* held to apply prospectively only). Iowa—*Iowa v. Lavin,* Nos, IM1-242, 319, 396, 397, IM2-230, 231, 261, Iowa Dist. Ct., Linn Co., August 13, 1973 (obscenity informations dismissed and statute held unconstitutional). New York—*Redlich v. Capri Cinema,* No. 41543/1973, N. Y. Sup. Ct., N. Y. Co., N.Y.L.J., Aug. 15, 1973, page 2, column 3 (CPLR §6330 incorporating by reference Penal Obscenity Law §235.00 held unconstitutional). New Jersey—*Hamar Theatres, Inc., v. Cryan,* D. N. J. (3-judge ct.), civil action no. 472-73,

July 26, 1973 (New Jersey obscenity statute held unconstitutional). There are concededly several cases to the contrary. Undoubtedly many of the cited cases, those *contra,* and others we are not aware of, will be presented to this court for review. If the court does not vacate, it is suggested alternatively that this court may wish to hold this petition pending consideration of other cases presenting similar issues.

II.

There is no decision in the Seventh Circuit construing 18 USC 1462 in accord with the second prong of the *Miller v. California* tripartite test, and hence the conviction should be reversed; even if the Seventh Circuit had construed 18 USC 1462, it could not be applied retroactively; additionally, there can be no conviction under the old social value test or new serious value test.

A. 18 USC 1462 does not and no Seventh Circuit or Illinois State decision to our knowledge specifically defined on June 21, 1973, patently offensive depictions of sexual conduct; the indictment should be dismissed.

Miller held, 37 L. Ed. 2d at 432, that "under the holdings announced today, no one will be subject to prosecution * * * unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by regulating state law, as written or construed."

Our research has uncovered no decision of the federal courts in the Seventh Circuit which has construed 18 U. S. C. 1462 or any federal obscenity statute so as to define patently offensive depictions of sexual conduct in accord with the guidelines, definitions or examples of *Miller, supra,* 37 L. Ed. 2d at 431, under part (b) of the new tripartite test. We submit there is no such case.

Assuming for the moment that federal definitions under part (b) of the new test must turn on state law, there is no authoritative definition in Illinois.

People v. Ridens, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), vacated and remanded *sub. nom. Ridens v. Illinois*, U. S. , 37 L. Ed. 2d 1030, involved the Illinois obscenity statute. One part of that statute recites almost verbatim the second part of the Roth-Memoirs "substantially beyond customary limits of candor in descriptions or representations" of nudity, sex or excretion test. *Ridens, supra*, and to our knowledge no other Illinois case, has construed the Illinois statute to define the term patently offensive depictions of sexual hard-core conduct.

Since on June 21, 1973, there was no Seventh Circuit or Illinois state decision which authoritatively construed the statute to define patently offensive depictions of sexual conduct, and the statute obviously does not define the term, the conviction should be reversed.

In *Stroud v. Indiana, supra*, the Indiana Supreme Court after remand from this court held the Indiana statute unconstitutional and reversed the judgment of conviction. The Indiana statute, as far as the definition of obscenity, follows the federal statute using the words "obscene, lewd, indecent," etc. However, the Indiana statute had also been construed to incorporate the Roth-Memoirs test verbatim, just as 18 U. S. C. 1462 had been so construed. *Stroud* held under *Miller, supra*, that the Indiana statute was "too general in nature and does not set out specifically the sexual or obscene acts," and reversed the conviction.

Redlich, supra, held the term customary limits of candor in describing nudity or sex set forth in the New York Penal Obscenity statute, Penal Law §235.00, is not the

equivalent of and is different from patent offensive representations of ultimate sex acts and is not a definition of patently offensive sexual conduct. The court held unconstitutional CPLR §6330 (Civil Injunction Statute) and therewith Penal Obscenity Statute §235.00 incorporated by reference.

It is not surprising that there is no case in the Seventh Circuit which has authoritatively construed 18 U. S. C. 1462 to define patently offensive depictions of sexual hardcore conduct. For if we read the majority opinion of *Miller* correctly, part (b) of the new test is an altered but purposefully new definition in order, *inter alia*, to furnish for future conduct concrete guidelines which had not been furnished before. This is a fair use of prospective law making.

Assuming for the moment that the Seventh Circuit had undertaken to construe 18 U. S. C. 1462 in accord with note 7, *United States v. 12 200-Ft. Reels, supra*, 37 L. Ed. 2d at 507 n. 7 (which the Seventh Circuit did not remotely undertake to do), the new definitions could not be applied retroactively to this case. *Bouie v. City of Columbia*, 378 U. S. 347 (1964); *Shuttlesworth v. Birmingham*, 394 U. S. 147, 156 (1969); *Ashton v. Kentucky*, 384 U. S. 195, 198 (1966); *Pierce v. United States*, 314 U. S. 306, 311 (1941); see, also, 20 Am. Jur. 2d *Courts* §236; 51 Virginia Law Review 201, 254.

B. There can be no conviction under the old social value or new serious value tests.

Subject material was not utterly without redeeming social value in accord with the rhetorical statement posed in the dissent of Mr. Justice White in *Memoirs v. Massachusetts*, 383 U. S. 413, 461, and in accord with the

Memoirs, supra, test carried to its logical conclusion. "Fanny Hill," we note, is the archtype of pornography devoted to little except minute and vivid depictions of sexual acts (383 U. S. at 446-447, Clark, J., dissenting). "Fanny Hill" has social value, and there is no difference between the pictures and the printed word. *Kaplan v. California,* U. S. , 37 L. Ed. 2d 492, 496, 497.

In *Miller* this court cast it in different terms, namely, that the social value test of *Memoirs, supra,* essentially had no meaning at all. That is not an ascertainable standard of guilt, a conclusion emphasized by *Redrup v. New York,* 386 U. S. 767 (1967), practices, *Stanley v. Georgia,* 394 U. S. 557 (1969), and the questions posed in *Alexander v. Virginia,* 408 U. S. 921, and in *Paris Adult Theatre v. Slaton,* 408 U. S. 921 (June 26, 1972).

The new serious value test may not be applied retroactively.

The petition should be granted and the conviction reversed.

III.

The exclusion of all evidence for defendant on the community standards issue was a violation of due process; this is a critical issue where this court has given little guidance, and especially important in view of *Miller*, *supra*. Additionally, the failure to charge whether the standard was national, state or local is a due process violation.

A. The exclusion of Community standards evidence for defendant.

The trial court excluded all evidence for defendant which would show what material was being openly sold and purchased as proof of the community standards, and that what defendant sold did not exceed it. That evidence, particularly that of newspaper reporters who were investigating and writing about the matter, would have demonstrated that what defendant sold was freely available and openly sold and was within the scope of the community standards. The denial of this right is a violation of due process. *Smith v. California*, 361 U. S. 147, 171-172 (Harlan, J., concurring and dissenting).

Concededly the community standards testimony was not offered by way of an expert. But the trial record is very plain that the trial judge was *not* going to permit community standards testimony in any form. The trial court at one point suggested it might consider an expert (Tr. 34), and then in the next breath said twice "I have never heard of an expert in pornography" (Tr. 34); the reporter would have to be an "expert in crime • • • you have got a tough job ahead of you" (Tr. 36). The repeated exclusion of any community standards testimony for defendant must be placed against the court's state-

ment that "these cases are not * * * decided based on standards of a community" (Tr. 30). In any event, as Mr. Justice Harlan pointed out in *Smith v. California, supra,* 361 U. S. at 172, the community standards proof need not be made by an expert, and it is a due process violation to exclude all such evidence. This error was compounded by the judge's comment (Tr. 487) in the jury's presence, which was tantamount to a directed verdict.

The question of the admissibility for defendant on the community standards issue of other essentially similar material is a constantly recurring one, with little guidance from this court, and particularly important in view of Part III of *Miller v. California, supra.* Some courts permit juries to see evidence of what is bought, sold or distributed.[1] *Womack v. United States,* 294 F. 2d 204, 206 (D. C. Cir. 1961), is a lead case contra.

In *Womack, supra,* one basis for exclusion was that there was no foundation to show "a reasonable degree of community acceptance of works like his own." Space does not permit, so we can only say, in conclusory form, that this begs the question and negates the entire concept of a community standard, leaves a jury in the dark, leaves no breathing space, and takes the issue out of the hands of the jury. The fact triers are entitled to know as an essential element for their determination what is being sold and what is available; facts which are not that well known. The *Womack* rule takes the issue away from the jury.

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[1] *United States v. Motion Picture Entitled "Pattern of Evil"* (S.D.N.Y., Civil No. 69-2157, Feb. 1970, Cannella, J.) (other films displayed to jury: "I Am Curious-Yellow" and "Without A Stitch"; picture held not obscene); *People v. Buckley,* 65 Misc. 2d 917, 320 N. Y. S. 2d 91 (Crim. Ct. N. Y. Co. 1971) (trial court permitted evidence of what was being sold, quite aside from expert testimony).

In any event, except for the opinion of Mr. Justice Harlan in *Smith, supra,* there is no guidance from this court, and for this reason alone the petition should be granted.

B. The jury was not advised what standard it should apply, national, state or local.

We submit it impossible to tell from the court's charge whether the standards were national, Illinois state or local Chicago. This is a charge with no standard. On this additional basis the judgment should be vacated, and, under Point IV, *infra,* reversed.

IV.

***Miller* held in state prosecutions the First Amendment does not require national standards, national standards are unascertainable, and states must make their own election both as to prurient interest and patent offensiveness by local (state) standards. The federal statutory law therefore turns on state law. Since national standards are not ascertainable, 18 USC 1462 is unconstitutional. Further, it is up to Congress to make the federal statute turn on state law, and in any event 18 USC 1462 is both vague and overbroad.**

A. This court has made patent offensiveness and prurient interest in federal prosecutions turn on state law, and correctly so under *Miller*. In addition, since national standards are unascertainable, there is no ascertainable standard of guilt and 18 USC 1462 is unconstitutional.

Patent offensiveness and prurient interest are substantive elements of the federal crime. We submit that the holding rationale and premises of Part III of *Miller, supra,* have made prosecutions under 18 USC 1462 turn on state choices and definitions of what patently offen-

sive depictions of sexual conduct shall be banned and regulated and has made state law applicable to the prurient interest test. The holding rationale and premises of Part III of *Miller, supra,* also render 18 USC 1462 unconstitutional for cases pending on June 21, 1973.

In *12 200-Ft. Reels, supra,* 37 L. Ed. 2d at 507, the court said that the *Miller* "standards are applicable to federal legislation," and in note 7 that if serious vagueness doubts are raised, that the court is prepared to construe the terms of the federal statutes as limiting regulated material to patently offensive descriptons, etc., given as examples in *Miller.*

Firstly, *Miller, supra,* 37 L. Ed. 2d at 434, held that the First Amendment "does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive' * * * [and] to require a state to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *If in a state prosecution it is, as this court held, an exercise in futility to structure the evidence around a national standard, and national standards are unascertainable, it is equally an exercise in futility to try to divine unascertainable national standards in a federal prosecution.*

Secondly, a second stated premise of *Miller* was that local communiites (which we assume for the moment to be statewide) should make the choices concerning both the prurient interest and patent offensiveness test and should not be, as *Miller* held, "strangled by the absolutism of imposed uniformity." That cannot be accomplished if in a federal prosecution there is to be a national standard. Hypothetically let us assume Pennsylvania and New York choose to drop all controls on the printed word (books) representations of sexual conduct because today they are not patently offensive, or for whatever

reasons. The legislative bodies of those states have made a choice that books are not patently offensive to those communities. The fact question about the patent offensiveness of a book cannot reach the jury. If there is a national standard which permits the federal government to prosecute for a sale, etc. of the very material which local communities have elected *not* to ban, then obviously the local communities are not making the very choices on two substantive elements of the crime which *Miller, supra,* held the local communities must make. In our hypothetical example there could be, we submit, no federal prosecution for interstate shipment on either end, Pennsylvania or New York.

In addition, the *Miller* objectives of fair notice, etc. will not be served if there is a federal penal statutory common law with some unascertainable and hypothetical national standard looming around to be superimposed on the states by federal government surveillance.

It has been suggested and held by the First Circuit[2] despite the foregoing that national standards must apply in federal cases. We submit that is impossible.

Elementarily a statute is unconstitutionally vague if it does not furnish an ascertainable standard of guilt. *United States v. L. Cohen Grocery Co.,* 255 U. S. 81, 89; *Lanzetta v. New Jersey,* 306 U. S. 451, 453, 455. This court has said that states should make their own choices of patent offensiveness and prurient interest in accord with their standards because essentially there shouldn't and couldn't be a national standard. This court has said that a national standard was not ascertainable. *A national standard, therefore, is not an ascertainable standard of guilt, period.* 18 USC 1462 is unconstitutional for cases pending on June 21, 1973.

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[2]*United States v. One Reel of Film,* no. 73-1181, 1st Cir., July 16, 1973.

B. Until Congress makes the federal statute turn on state law, it is unconstitutional; in any event 18 USC 1462 is both vague and overbroad until there is a reasonable time for state law to be formulated.

Congress undoubtedly has the power to enact a penal statute which makes the application of the federal law dependent upon state law, *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, and we will assume Congress can do so in the area of First Amendment rights. See *Manual Enterprises, Inc., v. Day*, 370 U. S. 478, 488. However, it is also assumed "in the absence of a plain indication to the contrary," that Congress is not making the application of a federal penal statute dependent upon state law, or definitions under state law. *Jerome v. United States*, 318 U. S. 101, 104; *United States v. Turley*, 352 U. S. 407, 411. In the absence of such a plain indication of Congressional intent, it is beyond the power of this court under Article 1, Section 1 of the United States Constitution and due process to make the federal penal statutes turn on state law. And until Congress does act, we have federal penal statutes directly affecting the First Amendment where we do not know what it means, cannot know what it means, and where there is no ascertainable standard of guilt.

Let us assume, *arguendo* only, this court does have the power to make substantive elements of the federal crime turn on state law, the federal statute is nonetheless both unduly vague and overbroad as written and applied, especially as to the patently offensive test. For there can be no prosecutions, or convictions, unless and until the state legislative bodies, or possibly the state courts, act to specifically define those patently offensive descriptions or depictions of hard-core sexual conduct which will be regulated or banned. At present it is not possible to tell

what the state law is. No matter what the technique, due process demands there be a reasonable period of time for the states to act.

Under any view 18 USC 1462 is unconstitutional and the conviction should therefore be reversed.

For certiorari purposes we assure this court that the questions raised by this Point IV will be involved in virtually every single federal prosecution.

V.

18 USC 1462 is unconstitutional as unduly vague, for even as to acts after June 21, 1973, the choice of which of the different categories of patently offensive descriptions of sexual conduct may be banned are policy decisions for Congress, not the courts.

In Point IV we urged that federal court application of the patently offensive and prurient interest test must turn on state law and on the same premises 18 USC 1462 was unconstitutional. If the court disagrees, we respectfully submit that it will be nonetheless an unconstitutional exercise of legislative power for this court, under *12 200-Ft. Reels, supra,* 37 L. Ed. 2d at 507, n. 7, to construe 18 USC 1462 by picking and making a policy decision of which of the many diverse categories of patently offensive depictions of sexual conduct are covered or proscribed by the statute.

In *United States v. Thirty-Seven Photographs,* 402 U. S. 363, 369, 374 (cited in note 7), the court concededly construed the statute, but in that case the court was reading a 60 or 74 days time limitation into the statute. The proper equivalent judicial function of construction and interstitial law making would involve an interpretation, to avoid vagueness, of the different categories of patently

offensive depictions of sexual conduct, but only after Congress has exercised its policy making decision to determine which, if any, should be proscribed.

Under part (b) of the new tripartite test there are some ten to eleven completely disparate and different categories of depictions of sexual conduct which Congress (and any state) may elect to proscribe. They include inter alia a patently offensive representation (i. e., picture) of an ultimate sex act, a patently offensive description (i. e., written word) of a simulated ultimate sex act and lewd exhibition of the genitals. Each of these categories will undoubtedly require authoritative construction to avoid vagueness. Interpreting these categories, after Congress has chosen which it will ban, is a judicial function. But it is first a policy decision for Congress to make as to whether any one or which ones of these categories may be proscribed. Otherwise this court is impermissibly legislating. *62 Cases, More or Less v. United States*, 340 U. S. 593, 596, 600 (1951); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944); *Christner v. Poudre Valley Cooperative Association*, 235 F. 2d 946, 950, n. 2 (10th Cir. 1956) (collation of Supreme Court cases).

While *Miller, supra*, and *Paris Adult Theatre, supra*, involved state cases, this court in both those cases emphasized that decisions concerning banning of sexually-oriented material was primarily a legislative function. In addition, we submit the reformulation in *Miller, et al., supra*, is quite different from the reinterpretation under *Roth v. United States*, 354 U. S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U. S. 413 (1966), for several reasons. We note one. This court now holds that certain categories of material may under the First Amendment be banned by Congress, which even under the most conservative view of the law all must agree heretofore could not be banned by Congress under this court's de-

cisions pre-*Miller*. The holding that the First Amendment is not a bar to regulation of such material is properly a judicial function. However, the decision as to whether to reimpose the controls is a legislative function. What we urge here is especially applicable if, as stated in Point IV, the federal law must turn on state law definitions.

The amendment and revision of the statute is for Congress, not the courts. U. S. Constitution, Article I, Section 1.

In closing, we do not think we are overstating the matter by reemphasizing that the *Miller, supra, et al.*, questions raised by this petition affect entire industries and hundreds of cases. These issues will be the subject of innumerable petitions and direct appeal applications to this court. These issues ought to be, indeed, must be resolved if the basic objectives of *Miller* are to be achieved.

CONCLUSION.

For the foregoing reasons petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York, N. Y. 10016,
212-MU6-8160,

JOHN POWERS CROWLEY,
CROWLEY, NASH AND SHEA,
53 West Jackson Boulevard,
Chicago, Ill. 60604,
312-922-8980,
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

December 14, 1972.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. John F. Kilkenny, Sr. Circuit Judge.*
Hon. Robert A. Sprecher, Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Western Division (70 CR 15)

IT IS ORDERED by the Court that a decision of this appeal be held in abeyance until the Supreme Court decided the case entitled *United States v. Orito,* No. 70-69 (October Term, 1972).

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*Judge John F. Kilkenny of the Ninth Circuit sitting by designation.

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

Argued October 24, 1972.

July 5, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. John F. Kilkenny, Senior Circuit Judge*
Hon. Robert A. Sprecher, Circuit Judge.

UNITED STATES OF AMERICA,

Appellee,

vs.

ALAN DAVID SIANS,

Appellant.

No. 71-1346

Appeal from the United States District Court, Northern District of Illinois, Western Division, No. 70 CR 15 WD Julius J. Hoffman, Judge.

*The Honorable John F. Kilkenny, Senior Circuit Judge for the Ninth Circuit, sitting by designation.

ORDER

Appellant was charged with, tried by a jury and convicted of, knowingly and willfully employing a common carrier for the interstate transportation of obscene materials in violation of 18 U.S.C. §1462. *United States v. Orito,* U. S. (June 21, 1973) answers appellant's challenge to the constitutionality of the statute. The material, by any standard, is shockingly obscene. We find nothing in the other contentions to justify comment. Accordingly, the judgment of the lower court must be affrmed.

IT IS SO ORDERED.

APPENDIX C.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

August 2, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Western Division. (70 CR 15)

On consideration of the motion of counsel for defendant-appellant,

IT IS ORDERED that leave be granted to file instanter the amendment to petition for rehearing presently lodged in the Office of the Clerk of this Court.

APPENDIX D.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

August 8, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. Robert A. Sprecher, Circuit Judge.
Hon. John F. Kilkenny, Sr. Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (70 CR 15)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX E.

UNITED STATES CONSTITUTION:

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause of the Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law.

Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 18

The Congress shall have Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

UNITED STATES CODE:

Title 18, Section 1462

§ 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 1462 is unconstitutional under *Miller* v. *California,* No. 70-73, decided June 21, 1973, in that it fails to define with particularity the obscenity it proscribes; that this Court's construction of the terms "obscene," "lewd," etc., as used in the federal obscenity statutes, constituted an unconstitutional exercise of legislative power; that the trial court erred in not allowing alleged comparable materials into evidence; and that the trial court's instructions did not make clear whether a national or local community standard was to be employed by the jury.

Following a jury trial in the United States District Court for the Northern District of Illinois, prior to this Court's recent obscenity decisions, petitioner was convicted of knowingly causing obscene magazines and

decks of playing cards to be shipped interstate by common carrier, in violation of 18 U.S.C. 1462. He was sentenced to five years' imprisonment and a $5,000 fine. The court of appeals, after this Court's decision in *Miller*, affirmed by memorandum order (Pet. App. B).

The case arose out of the following facts: In the summer of 1968, petitioner approached James S. Harris, who operated a mail-order "girly" magazine business in Rockford, Illinois, and discussed supplying him with playing cards, films and magazines (Tr. 98-102). In November 1968, Harris agreed to purchase $600 worth of playing cards and magazines from petitioner, and he sent a check for that amount to petitioner at his home in Dayton, Ohio (Tr. 124-125; Gov. Exh. 1). On December 19, 1968, petitioner shipped from Dayton, Ohio to Harris in Rockford, Illinois, by Greyhound Lines two cartons containing 80 decks of playing cards and about 60 magazines with explicit pictures of males and females engaged in sexual intercourse in a variety of positions (Tr. 124-125; Gov. Exhs. 3-9). Thereafter, petitioner and Harris had other dealings in similar materials (Tr. 133, 136-138).

1. Petitioner contends that the court of appeals did not follow the standards set by this Court in *Miller* v. *California, supra,* and companion cases.[1] He argues that under *Miller* an appellate court must construe 18 U.S.C. 1462 to define the statutory standard before there can be a conviction under the statute. This argument, however, ignores this Court's

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[1] *Paris Adult Theatre I* v. *Slaton,* No. 71-1051; *United States* v. *Orito,* No. 70-69; *United States* v. *12 200-Ft. Reels of Super 8mm Film,* No. 70-2; *Kaplan* v. *California,* No. 71-1422.

decision in *United States* v. *12 200-Ft. Reels of Super 8mm Film,* No. 70-2, decided June 21, 1973, in which the Court specifically addressed the problem of defining such words as "obscene" and provided authoritative standards for interpretation of these words in federal statutes. Slip op. 7, no. 7. Since the lower federal courts are bound by that construction, their only task on review is to determine whether, under those standards, the materials involved were obscene.[2]

The court of appeals considered the materials under the *Miller—12 200-Ft. Reels* standard. The delay of the decision by the court below until after this Court's decisions and its subsequent ruling that "[t]he material, by any standard, is shockingly obscene," indicates that the court applied both the *Roth—Memoirs* and *Miller* guidelines.[3] The extent of

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[2]State courts, on the other hand, are required to review state obscenity laws for definiteness. As is apparent by the state cases cited by petitioner (Pet. 11-12), some state courts have found their state obscenity statutes inadequate, and they have reversed convictions on those grounds. These holdings have no effect on federal cases. With respect to dismissal of the indictment in *United States* v. *Lang,* No. 10712-HP-CP, C.D. Cal., July 18, 1973, the government is appealing that decision, which is the only federal case to have held that *Miller* prohibits prosecutions in pending cases arising out of acts committed prior to its rendition on June 21, 1973.

[3]*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413. Petitioner's suggestion that the material is not utterly without redeeming social value is unsupported. He does not suggest what social value the cards or magazines have, and it is clear they have none. "Fanny Hill," found to have social value in *Memoirs, supra,* is not comparable to these materials.

the review by the Seventh Circuit is similar to the treatment other circuits have given obscenity convictions reconsidered under *Miller*. See, *e.g.*, *United States* v. *Cote*, No. 72-2417 (C.A. 5, October 11, 1973) (*per curiam*); *Brown* v. *United States*, No. 71-1759 (C.A. 4, September 18, 1973) (order upon remand); *United States* v. *Carlson and Truax*, No. 73-1519 (C.A. 9, August 27, 1973); *United States* v. *Hamling*, 481 F. 2d 307 (C.A. 9) (denial of rehearing after reconsidering under *Miller*).

2. The contention that 18 U.S.C. 1462 is unconstitutional under *Miller* was answered in our memoranda in opposition in *Hamling, et al.* v. *United States*, No. 73-507 and in *Carlson and Truax* v. *United States*, No. 73-528 (both filed December 1973), upon which we rely here.[4] Contrary to petitioner's claim, *Miller* did not make federal obscenity laws turn on state law. Petitioner contends that because states may measure obscenity by state-wide standards rather than national standards, federal obscenity laws turn on state law. But applying contemporary state-wide community standards as opposed to national standards has nothing to do with state law. Either standard merely delineates the geographically determined group of people whose view the jury is to reflect. The jury does not look to state law to determine what people within the state would consider prurient or patently offensive; rather, it looks to its own experience or to expert testimony.

3. Petitioner further contends that this Court in *12 200-Ft. Reels of Film*, *supra*, improperly engaged in a

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[4]Copies of these memoranda are being sent to petitioner.

legislative function by defining the terms "obscene," "lewd," etc., used in federal obscenity statutes. Congress, however, determined that obscene materials may not be shipped in interstate commerce, and in *Roth* and *12 200-Ft. Reels* this Court merely defined the standards which must be used to identify those materials.[5]

4. Petitioner argues that the trial court erred in not allowing him to introduce into evidence comparable pornographic material allegedly available in the community. Such evidence would have been irrelevant since it would show only that other persons in the community may also have been selling obscene materials. Petitioner offered no expert testimony linking this proffered evidence to his defense. In these circumstances, the trial court correctly exercised its discretion in excluding the allegedly comparable materials from evidence. *United States* v. *Hamling, supra,* 481 F. 2d at 320; *United States* v. *Manarite,* 448 F. 2d 583, 593 (C.A. 2), certiorari denied, 404 U.S. 947; *Womack* v. *United STates,* 294 F. 2d 204, 206 (C.A.D.C.), certiorari denied, 365 U.S. 859.

5. Petitioner contends here, for the first time,[6] that under the trial court's instructions, it is not clear whether a national or local community standard was applied, and therefore, his conviction should be

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[5] *Miller, supra,* slip op. at 5. *United States* v. *12 200-Ft. Reels of Super 8mm Film, supra,* slip op. at 7, n. 7.

[6] On amended petition for rehearing below petitioner contended that a local standard should have been applied, but did not argue the instructions were defective for failing to state the standard.

vacated. While the trial court did not designate which community standard was to govern, petitioner did not object to the instruction or request that the instruction designate a particular standard. In any event, in view of the type of materials involved here, it cannot be supposed that if the standard had been specified, the finding of the jury that the materials were obscene would have been different. See *United States* v. *Miller*, 482 F. 2d 1379 (C.A. 9). Additionally, the court below made its own independent constitutional judgment, as required by *Jacobellis* v. *Ohio*, 378 U.S. 184, 188, that the materials, by any standard, are obscene.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

[illegible]-1973-12

DEC 26 1973

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S OPPOSITION MEMORANDUM

RALPH J. SCHWARZ, JR.
22 East 40th Street
New York, N. Y. 10016

JOHN POWERS CROWLEY
CROWLEY, NASH & SHEA
53 West Jackson Boulevard
Chicago, Ill. 60604
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S OPPOSITION MEMORANDUM

Preliminary Statement

Petitioner replies to the government's opposition memorandum. Petitioner was indicted and convicted under a statute too vague as applied and which furnished no ascertainable standards of guilt (and sentenced to five years on a one-count indictment). The jury charge was a straight *Roth-Memoirs** charge under the old three-fold test (Tr. 636-638).

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* *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). The jury charge is reproduced in Appendix F annexed.

Government counsel graciously forwarded government's opposition memorandum in *Hamling* v. *United States* (on writ petition to the Ninth Circuit No. 73-507). The government stated their position in this case would be the same as in *Hamling*, except the government would also deal with the exclusion of all community standards proof (Sians Petition Point III), which is a separate issue in this case.**

Manual Enterprises, Inc. v. *Day*, 370 U.S. 478, 488 (1962), held that for community standards purposes there "must first be decided the relevant community" (Point IV, *infra*), and that in a federal prosecution the relevant community standard was a national one. The government says no objection was taken to the charge re community standards. But this case was tried as a federal prosecution. Unlike *Miller* v. *California*, —— U.S. ——, 37 L.Ed.2d 419, 435 (1973), no one in this federal case proceeded on the basis that the relevant community was a state or local one, but rather that the relevant community was a national one. Hence, of course, no objection was taken to the charge. However, this point was raised on the amendment to the petition for rehearing.

The bottom line is that national standards do *not* furnish an ascertainable standard of guilt against which to measure community standards pre-*Miller*, or post-*Miller*. Hence, the conviction may not stand. (Point IV, *infra*.) This is supported, *inter alia*, by the December 11, 1973 opinion of the Tenth Circuit, *United States* v. *Friedman* (Nos. 72-1143-44, 10th Cir., Dec. 11, 1973).

While we submit the Seventh Circuit is wrong, we note for certiorari purposes that decisions of federal (and state) courts are in conflict with those of the Seventh Circuit. For clarity we follow the sequence of the Sians petition.

** Government counsel also courteously forwarded their draft copy, but mails being what they are, we had to start the preparation.

I

The Seventh Circuit memo order of July 5, 1973 on its face does not reconsider indictment sufficiency or *Miller* issues.

The July 5, 1973 memorandum order of the Seventh Circuit which affirmed the judgment of Conviction (Appendix B to Petition) on the face of it does not reflect a "reconsideration of the sufficiency of the indictment in light of *Miller*," *United States* v. *Orito*, —— U.S. ——, 37 L.Ed.2d 513, 519 (1973), or any *Miller* v. *California* issues, —— U.S. ——, 37 L.Ed.2d 419 (1973).

The government says this was not necessary since *United States* v. *12 200-Ft. Reels*, —— U.S. ——, 37 L.Ed.2d 500, 507 n. 7, read the new tests into the statute. The government, following the *Hamling* brief and relying on *United States* v. *Thevis* (No. 71-2614, 5th Cir., Sept. 12, 1973), further contends that Miller was, according to the government, a "clarification and modification" of the *Roth* and *Memoirs* standards, and hence there was no unconstitutional impropriety.

If the government is correct, it would certainly render considerable portions of *Miller* superfluous. It completely ignores the concept of prospective law making.

II

Petitioner was indicted and convicted on basis of improper constitutional standards; neither test (b) nor test (c) may be applied retroactively.

A. Vagueness of Statute as Applied and New Miller Test (b).

If the English language has any meaning, what this court said is very plain. *Miller* held, 37 L.Ed.2d at 430, we "*now confine* • • • regulation to works which depict • • •

sexual conduct. That conduct must be *specifically defined* • • • [by statute or as] authoritatively construed." (Emphasis supplied.)

Miller continued, 37 L.Ed.2d at 432-433, "no one will be subject to prosecution • • • unless these materials depict or describe patently offensive 'hard core' sexual conduct *specifically defined*" by statute or authoritative construction. These "specific prerequisites will provide fair notice."

18 USC 1462 obviously does not contain the requisite specificity. In Sians' petition we stated (pp. 12-13) that there is no decision of the Seventh Circuit which pre-*Miller* construed 18 USC 1462 or any other federal obscenity statute to meet the requisite specificity requirements of part (b) of *Miller*, or the prerequisites of fair notice. The government's opposition memorandum does not cite any such case. There is no such case.

Instead, the government contends, citing *Thevis*, that at no point did this court in *Miller*, in what the government calls a "clarification and modification" of the *Roth* and *Memoirs* standards, indicate that the *Roth-Memoirs* standards were unconstitutional. Furthermore, the government urges that the fact that the *Miller*, et al. cases were remanded, instead of being reversed, compels the same conclusion.

In the *past* when *this court* has clarified or modified the *Roth* test, the plurality has *always cited Roth*, and stated it was relying on *Roth*. *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 486-489 (1962), enunciated old part (b) of the prior test—whether material is patently offensive because it affronts contemporary community standards. *Manual Enterprises* cited *Roth*, and stated (370 U.S. at 487) that the *Roth* prurient interest test was but a "compendious way" of stating both tests. The *Memoirs* plurality, 383 U.S. at 418, cited *Roth* and said it relied on *Roth*.

Miller does not cite *Roth* or any opinion or dissent to support *Miller* test (b) or test (c).

The government's position that the *Roth-Memoirs* tests were constitutionally adequate flies in the face of the *Miller* language, quoted above, mandating specificity as "specific prerequisites" of fair notice and any prosecution, and the *Miller* statement (37 L.Ed.2d at 430) that "no member of the court today supports the *Memoirs* formulation." It is contradicted by the *Miller* statement (37 L.Ed.2d at 434) that on June 21, 1973 for the first time since *Roth* a majority had agreed on "*concrete* guidelines" whereby the court can abandon "the *casual* practice of *Redrup* v. *New York*, supra" (emphasis supplied). Casual practices do not give fair notice and do not provide ascertainable standards of guilt. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Herndon* v. *Lowry*, 301 U.S. 242, 263-264 (1937) (conviction vacated, no ascertainable standard of guilt, relying and quoting from *L. Cohen Grocery*); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963) (the standards "of permissible statutory vagueness are strict in the area of free expression"). See, also, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

The government's position would render *Miller* footnote 6 (37 L.Ed.2d at 430 n. 6) and the prerequisite fair notice requirement pointless. Footnote 6 states prior authoritative constructions "may well be adequate" to meet the specificity requirement set forth in the text. This statement and the *Miller* text statement at 432-433 would be meaningless if courts on remand were not directed to look to pre-*Miller* constructions to see whether they were adequate. Adequate for what—to see whether the specificity requirement for fair notice was met and vagueness alleviated. It is the absence of any prior authoritative construction in accord with *Miller* test (b) specificity which rendered the statute too vague as applied to the instant indictment and conviction.

Miller, et al. were not undertaking a review of the statutes and prior decisional law of fifty states and every federal appellate court to see if pre-*Miller* constructions were adequate. We submit that is one clear reason for the remands, namely, to see whether there were in each specific case pre-*Miller* constructions which met the specificity requirements. As stated in Siana' petition, in this case there was none. Hence, the conviction cannot be sustained, unless (which is not permissible) the new tests are applied retroactively.

The analytic approach of most state courts is in accord with our approach. This is true whether state courts have reversed or affirmed convictions. Where state courts have post-*Miller* upheld convictions pre-*Miller,* they have for the most part looked to their particular decisional law pre-*Miller,* or in certain instances to other state statutes pre-*Miller* to determine whether constructions pre-*Miller* meet specificity requirements of part (b).

Since the standards for testing the constitutionality under *Miller* are the same for states and the federal government (*United States* v. *12 200-Ft. Reels,* —— U.S. ——, 37 L.Ed.2d 500, 507 [1973]), it would seem rather preposterous that the approach would be different. In any event, our approach is, we submit, the approach dictated by this court's opinions. It is consistent with all parts of the *Miller,* et al. decisions, including *12 200-Ft. Reels* footnote 7 (37 L.Ed.2d at 507 n. 7) and *Miller* footnote 6.

Test (b) was, we submit, a new test and new formula designed to alleviate and cure vagueness inherent in the statute and prior constructions thereof. Absent prior authoritative constructions in the Seventh Circuit satisfying specificity and fair notice, the conviction cannot be sustained.

In *Detco, Inc.* v. *McCann* (E.D.Wisc., Civ. 72-C-121, Oct. 19, 1973, 3-judge ct.), a three-judge federal court continued

in effect a temporary restraining order restraining the enforcement of the Wisconsin obscenity statute pending resolution by the state court, stating that *Miller* was likely to spell the death knell of the Wisconsin statute. Pertinent to this case is the holding by the unanimous three-judge court with reference to *Miller* test (b):

> "This new formula was designed to provide for standards more concrete and specific than those of the past and to alleviate the problems posed by the void-for-vagueness doctrine and the requirements of notice." (Slip. op. p. 2)

In *United States* v. *Henson* (73-2063, 9th Cir., Oct. 5, 1973) defendant was tried in March/April 1973 and found guilty in April 1973 of violating 18 USC 1462. The Ninth Circuit vacated and remanded in the light of *Miller*, and *also* cited *Stroud* v. *Indiana*, —— Ind. ——, 300 N.E.2d 100 (Ind. Sup. Ct. Aug. 21, 1973), remanded —— U.S. ——, 37 L.Ed.2d 1025 (June 25, 1973) vacating and remanding 273 N.E.2d 842 (Ind. Sup. Ct. 1971). As we stated in our petition (p. 13) the Indiana statute definition of obscenity is identical to 18 USC 1462. The Indiana Supreme Court had prior to *Miller* construed the Indiana statute to incorporate the *Roth-Memoirs test* (273 N.E.2d at 847) so that in *Stroud* the statute and case law paralleled federal Supreme Court decisional law. *Stroud* after remand from this Court held the Indiana statute deficient for failing to set out specifically the proscribed sexual acts, reversed and directed the trial court to discharge the defendant. While *en banc* rehearing in *Henson* has been granted (along with the Miller federal cases), the *Henson* citation of *Stroud* supports our position.

B. Retroactivity.

A new limiting construction, a new definition, a new interpretation of penal statutes, not foreshadowed by prior decisions, designed to cure vagueness, may not be applied

retroactively. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-354 (1964); *Douglas* v. *Buder*, —— U.S. ——, 37 L.Ed. 2d 52, 54-55 (1973); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155, 156 (1969); *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966); See also *Pierce* v. *United States*, 314 U.S. 306, 311 (1941)); *Rabe* v. *Washington*, 405 U.S. 313, 315, 316 (1972).

With reference to part (b), *Miller* said (37 L.Ed.2d at 430) we *"now confine"* obscenity regulation to works that depict sexual conduct specifically defined (emphasis supplied). That is a limiting construction placed on the statute on June 21, 1973.

Miller cited no case and no dissenting opinion in support of or which foreshadowed test part (b) (or part c). There is none in this court. There is none in the Seventh Circuit.

Tests (b) and (c) both enlarge the scope of permissible regulation and simultaneously constitute an unforeshadowed limiting construction designed to cure vagueness. They were unforeseeable constructions of a criminal statute. They may not be applied retroactively to validate the convictions. *Bouie, supra; Shuttlesworth, supra,* 394 U.S. at 156; *Douglas, supra.*

Test (b) and test (c) are also new definitions. The court cannot adopt "a different definition of the offense" to validate the conviction. *Ashton, supra,* 384 U.S. at 198. We also submit that *Rabe, supra,* is applicable, to wit, that petitioner's conviction cannot be affirmed "under a statute with a meaning quite different from the one he was charged with violating". *Rabe, supra,* 405 U.S. at 315.

As stated, in the past when this court has modified or clarified the *Roth* test, the plurality has *always* cited *Roth*, and stated it was relying on *Roth*. *Manual Enterprises, supra,* stated (370 U.S. at 487) that the *Roth* test was but a "compendious way" of stating both the prurient interest

test and the old patent offensive community standards test. The *Memoirs* plurality, 383 U.S. at 418, cited *Roth*, and said the question was whether *Fanny Hill* "satisfies the test of obscenity established in *Roth*". The question here, of course is not whether the *Memoirs* plurality did or did not correctly interpret *Roth;* the plurality relied on it.

The *Miller* majority does not cite *Roth* nor any other case, opinion or dissent to support test (b) or test (c) and none which foreshadowed them.

For certiorari purposes the nationwide importance of the issues here presented is also attested to by the memorandum decision in *United States* v. *Carter* (W.D. Tenn., CR 72-207, Dec. 12, 1973). In *Carter, supra,* the court dismissed the indictment charging violation of 18 USC 1462 and 18 USC 1465 and conspiracy charges involving pre-*Miller* interstate transportation of alleged obscene motion pictures in various parts of the country. The court held essentially that the issue of whether *Miller* might be applied retroactively was of sufficient import that it should be resolved prior to any trial and noted that there were decisions "both ways" on this issue.

C. The "Utterly Without" Test, Vagueness and Retroactivity.

The "utterly without redeeming social value" charge to the jury was based on *Memoirs,* in almost *haec verbae* (Tr. 637-638*). That charge reproduced below and in Appendix F annexed hereto states material is obscene only if "utterly lacking in social value or importance." *Miller,* 37 L.Ed.2d at 431 n. 7, described the "social importance" phrase as an

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* Finally material is obscene under the federal statute only if it is completely and utterly lacking in social value or importance. If the article has even a small amount of artistic or social value or importance, it is not considered obscene under the law even if its primary appeal is to prurient interest and goes beyond community standards."

"ambiguous concept". An ambiguous concept is not an ascertainable standard of guilt.

But it is not just one footnote. We submit we were entitled to a charge in accord with this court's view and evaluation of the social value test (*Miller*, 37 L.Ed.2d at 429). That should include a statement of the rhetorical question of Mr. Justice White that if persons bought the material, that proved its social worth; that Mr. Justice Harlan wondered if the test had "any meaning at all"; and that this court's majority quoted the foregoing. And the logical conclusion of the foregoing is, we submit, that petitioner was entitled to a charge that if the material amused or entertained in the slightest, it had value. The social value test did not furnish an adequate ascertainable standard of guilt. *United States* v. *Lang*, 361 F.Supp. 380 (C.D. Cal. 1973).

The new serious value test, which is a limiting construction and a new and vastly more restrictive definition, may not be applied retroactively.

III

The exclusion of all testimony for defendant on community standards was due process error.

The government contends that the exclusion of all defendant's proffered evidence of other material openly sold was proper. The government contends this is irrelevant because it would show that others had been selling supposedly "pornographic" material.

We submit that evades the point. The community standards pre or post-*Miller* involves the tolerance level of the relevant community. But this is a changing concept. The community "cannot * * * condemn that which it generally tolerates." *Smith* v. *California*, 361 U.S. 147, 171 (Harlan, J. concurring and dissenting).

If the foregoing has any meaning, then proof of what is *openly* sold and *openly* exhibited is *some* evidence of the community level of tolerance. On the government's view, a defendant would have to first prove that a court decision, and presumably an appellate decision, has held various items not obscene before any evidence of community standards is offered. This emasculates the basic premise. Community tolerance levels are not measured just by appellate court rulings.

The government has also failed to comment on the trial court's highly prejudicial comment in the presence of the jury concerning the proffered evidence.

It was a violation of due process to rebuff every effort by defendant to offer community standards proof.

IV

The indictment and conviction predicated on national standards furnished no ascertainable standard of guilt.

The indictment was returned and the prosecution and the conviction obtained under a statute which had no ascertainable standard of guilt for the critical factor of the relevant community standards under old tests or *Miller* tests (a) and (b).

The government contends that the application "of a national, rather than a state standard" is not improper, and cites *United States* v. *Marvin Miller* (71-1850, 9th Cir., Aug. 31, 1973). But *Miller* held (37 L.Ed.2d at 435) that national standards were "hypothetical and unascertainable," and that determination of national standards was an exercise in futility and, as stated, that the standards for testing the constitutionality of state statutes under *Miller* are "applicable to federal legislation" (*12 200-Ft. Reels,* 37 L.Ed.2d at 507). But if determination of na-

tional standards is an exercise in futility in a state case, it is equally an exercise in futility in a federal prosecution.

In this federal case the charge to the jury was predicated on the *Roth-Memoirs* test. *Manual Enterprises, supra* (370 U.S. at 488) held that in a federal prosecution the standards were national. *Manual Enterprises* also held (370 U.S. at 488) that there "*must* first be decided the relevant community." The charge in this case of course was given against the law as it existed. But *Miller* clearly held that a national standard was and is not an ascertainable standard.

The conflicts in the decisions are already clear.

On December 11, 1973 the Tenth Circuit in *United States* v. *Friedman* (Nos. 72-1143-44, 10th Cir., Dec. 11, 1973) vacated the 1971 convictions of Friedman, et al, and remanded to the district court for a new trial in the light of *Miller,* et al. Here germane, the Tenth Circuit held (sl. op. p. 3):

> "A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing, —— F.2d —— (Tenth Circuit, No. 638-70), opinion after remand to this court."

As stated, the government cites *United States* v. *Thevis* for the proposition that the *Miller,* et al. decisions were allegedly a clarification and modification of the *Roth-Memoirs* standards. But *Thevis* also stated (slip op. p. 9) that *Miller* held "community standards" does *not* refer to a nationwide community.

As stated in *United States* v. *Carter, supra,* the district court in Tennessee dismissed the indictment. The Tennessee District Court also held there should be a resolution before trial on the issues raised by defendant that there

cannot be a national standard and hence there was no ascertainable standard of guilt.

It should also be noted that despite the Ninth Circuit August 31, 1973 *Miller* case and the First Circuit opinion in *United States* v. *One Reel of Film*, 481 F.2d 206 (1st Cir. July 1973), various federal obscenity trials are proceeding on the basis that the relevant community is a local community. In these cases the local community is measured by the judicial district.

The ascertainment and knowledge of the *relevant community* is the *sina qua non* for establishing ascertainable standards in the community standard application of the tests for any indictment or conviction pre-*Miller* or post-*Miller*. *Manual Enterprises, supra,* 370 U.S. at 488 (there *"must first be decided the relevant community"*).

Defendant was indicted and convicted in the federal prosecution on the basis of a national standard. The charge was given in this case on the basis of federal law as it then existed.

The government says no objection was taken to the charge. But this federal case was tried on the basis of federal law, including *Manual Enterprises*. Unlike *Miller*, 37 L.Ed2d at 435, the parties in this case did not proceed on the basis of state or local standards, and the trial court did not intimate that a local or state standard was the relevant community standard. Hence, there would be no reason for objecting to the charge.

The government says that applying statewide community standards as opposed to national standards has nothing to do with state law. The Sians' petition had made this point to emphasize this as an additional reason why there was no ascertainable standard in a federal prosecution both under the old law involving the Sians' indictment and conviction and parts (a) and (b) of the new *Miller* tests.

Now, obviously, a community tolerance level is a fact issue for a jury and the *Miller* state case so held. But this fact issue of community tolerance is not divorced from and totally unrelated to all local law on the subject. The local tolerance will turn in some measure on legislative enactments or state or local decisions. It is for this additional reason that we urged that in federal prosecutions the relevant community had to be local. It is in this sense that the relevant standards must turn on local law.* Otherwise, the entire objective of fair notice and guidance is being defeated.

If a shipper ships paperbacks or whatever from State A to State E, then that shipper should be able to look to the laws of State E, the place of distribution.

That shipper should not have to be concerned with a federal prosecution based on some abstract notions of average person offensiveness for every State between State A and State E.**

We submit that as a matter of constitutional law that in a federal prosecution the relevant community must be a local community.

In any event national standards did not and do not furnish an ascertainable standard of guilt.

While there are prior dissents which in a way foreshadowed "a local community" standards test, *Jacobellis* v. *Ohio, supra,* 378 U.S. 184, 200 (1964), was a *state* case, not a federal prosecution. The cases such as *Hoyt* v. *Minnesota,* 399 U.S. 524, 525 (1970), cited by *Miller,* 37 L.Ed.2d at 435-436, all involved state cases. While reliance

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* Congressional Bill S-1 93rd Congress so provided. It was never acted on. We also urged that making the local community the relevant community was a matter for Congress.

** Shipper should also know that he will be judged by the community tolerance level of the judicial district where the material is disseminated.

is not a factor, these dissents were in state cases. They do not furnish the basis for foreshadowing of a change in a federal prosecution. This new *Miller* rule may not be applied retroactively.

National standards did not furnish an ascertainable standard of guilt. The indictment and conviction may not stand.

CONCLUSION

For the foregoing reasons petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

RALPH J. SCHWARZ, JR.
22 East 40th Street
New York, N. Y. 10016
212—MU 6-8160

JOHN POWERS CROWLEY
CROWLEY, NASH AND SHEA
53 West Jackson Boulevard
Chicago, Ill. 60604
312-922-8980

Attorneys for Petitioner

APPENDIX F

Obscenity Tests Charge to Jury

(Tr. 636-638)

Charge

The statute includes, as I have just indicated, the words "obscene, lewd, lacivious, indecent and filthy." Those words refer to matters that deal with sex in a manner such that the predominant appeal is to prurient interests. An article is obscene within the meaning of the statute only if, when taken as a whole and not part by part, it appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex as established by the current standards of the community as a whole.

Furthermore, matter is not obscene under the statute unless it is utterly lacking in redeeming social value or importance. This definition of obscenity within the meaning of the statute is composed of a number of elements or factors. First you must ascertain the predominant theme of the matter taken as a whole. An item is not obscene merely because a part of it appeals to prurient interest. Such appeal must be the predominant theme of the article. Second, the appeal to prurient interest must be determined in relation to the intended and probable recipients of the material. Such appeal may be to average persons in the community or it may be to a deviant sexual group. What that means is that in evaluating the material to determine whether it is obscene, you as jurors should not judge it by how it affects you individually but how it would affect or appeal to the intended or probable recipients. Third, an item is not obscene simply because it deals with or portrays sex. Matter appeals to prurient interest if it deals with sex in a morbid way and goes substantially beyond the contemporary stands of the entire community.

Thus, you may not find that an item is obscene material merely because it deals with sex in a manner that would be offensive to some people or to certain groups. The material must be judged by the standards of the community as a whole. In determining contemporary community standards, you may consider what, as shown by the evidence admitted during the trial, appears in contemporary magazines, books, newspapers, television programs, motion pictures and other media of communication which are freely available in the community as a whole.

Finally, material is obscene under the federal statute only if it is completely and utterly lacking in social value or importance. If the article has even a small amount of artistic or social value or importance, it is not considered obscene under the law even if its primary appeal is to prurient interest and goes beyond community standards.